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of the United States**

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Decision

Matter of: SWR, Inc.

File: B-294266

Date: October 6, 2004

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Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency decision not to set aside procurement for Historically Underutilized Business Zone (HUBZone) small businesses is sustained where decision was based on insufficient facts to establish reasonableness of conclusion that HUBZone business concerns of which the agency was aware were not interested in, and/or not capable of, performing the requirement.

DECISION

SWR, Inc. protests the terms of request for proposals (RFP) No. M00146-04-R-9024, issued by the U.S. Marine Corps (USMC) for the washing of various aircraft at three Marine Corps Air Stations (MCAS) in North and South Carolina. SWR asserts that the RFP, issued as a small business set-aside, instead should have been set aside for Historically Underutilized Business Zone (HUBZone) small business concerns.

We sustain the protest.

BACKGROUND

The RFP sought proposals for a fixed-price contract to provide authorized maintenance personnel to clean, wash, lubricate, and inspect aircraft at three USMC installations—three wash racks at MCAS Cherry Point for EA-6B, AV-8B, and KC-130 aircraft; two rotary-wing wash racks at MCAS New River for UH-1N, AH-1W, CH-53, and CH-46 aircraft; and two fixed-wing wash racks at MCAS Beaufort for F/A18

aircraft. The requirement here resulted from the combination of the work under two delivery orders that had been issued to large businesses, representing 95 percent of the work at all three installations, and a Cherry Point contract awarded to SWR, which represented the remaining 5 percent. In January 2004, prior to issuing the RFP, the agency performed market research that included consideration of current and past aircraft washing procurements. This research disclosed that the last USMC combined aircraft washing procurement had been conducted at Camp Pendleton in August 2000 on an unrestricted basis, and that award had been made to a small business. The contract specialist also obtained a copy of an RFP for aircraft washing issued by Charleston Air Force Base (CAFB); the specialist believed that procurement was a 100-percent small business set-aside based on the RFP's cover page but, as she later discovered, it was a HUBZone set-aside.

The specialist also used the Small Business Administration's (SBA) Pro-Net web-based small business database system to search for potential HUBZone offerors.¹ She ran several searches after determining that the most relevant North American Industry Classification System (NAICS) code was 488190, which covers "other support activities for air transportation." Two searches included NAICS code 488190, the HUBZone restriction, and the keywords "aircraft maintenance" and "aircraft washing." Neither search identified any HUBZone certified firms. When the specialist ran another search using the keywords "aircraft maintenance" and NAICS code 488190, but without the HUBZone restriction, she found 18 small businesses. Based on her market research, the specialist decided to issue the RFP as a 100-percent small business set-aside, and obtained concurrence in that decision from the local (Cherry Point MCAS) small business specialist. Notice of the requirement as a proposed small business set-aside was posted to FedBizOpps on February 20.

Thereafter, in telephone conversations on March 30 and April 1 with CAFB contracting personnel, the contracting officer learned that the CAFB procurement was a HUBZone set-aside. Agency Report (AR) Tab 8. She also learned that the awardee was U.S. Logistics, Inc. (USL), that SWR had protested the award, and that there also was a third offeror, a team comprised of the incumbent and another firm. Id. The contracting officer asserts that it was from these conversations that she first learned that "SWR might be a HUBZone firm." Contracting Officer's Statement (COS) ¶ 8. Earlier, on March 30, the contract specialist received, and replied to, an e-mail inquiry from USL regarding the USMC procurement's progress and the scheduling of a site visit.² AR, Tab 16. USL's e-mail did not mention its HUBZone

¹ Pro-Net, now integrated with the central contractor registration databases under the heading "Dynamic Small Business Search," is an on-line database of information on thousands of small, disadvantaged, Section 8(a), HUBZone, and women-owned businesses. See www.ccr.gov.

² The contracting officer states that she was unaware of this e-mail until after SWR filed its agency-level protest. COS ¶17(c).

status or question the small business set-aside. Based on the absence of any inquiries about the procurement from firms identifying themselves as HUBZone firms, the agency issued the RFP on May 5, 2004 as a total small business set-aside.

Prior to the July 2 closing time for receipt of proposals, SWR filed an agency-level protest challenging the failure to set the procurement aside for HUBZone small businesses. As part of her review of the protest, the contracting officer conducted additional Pro-Net searches using the key words “aircraft wash” and “aircraft washing,” but excluding the NAICS code. These searches identified SWR and a second firm as being HUBZone certified. Also as part of this review, the contracting officer reviewed those firms that had expressed interest in the current procurement, including USL and another firm. Based on the Pro-Net profile and past performance information, the contracting officer concluded that SWR and the other firms—except USL—were not capable of performing the requirement. As for USL, the contracting officer made two telephone calls to USL’s president, and determined that the firm was not interested in competing because the calls were not returned. The contracting officer also reviewed information on the six firms—in addition to SWR and USL—that had competed under the CAFB HUBZone set-aside. Of those firms, the agency found that two were not HUBZone certified and that four were not capable of performing the requirement. Taking this information into account, the agency denied SWR’s agency-level protest, and the firm then filed this protest in our Office.

After the protest was filed, the contracting officer conducted an additional review of two HUBZone-related procurements. The first was a HUBZone set-aside for aircraft washing conducted by the Department of Homeland Security (DHS) that resulted in the receipt of four proposals. The DHS solicitation was canceled, however, because all offers were much higher than the government estimate, and DHS had insufficient funding. AR, Tab 19. The second was a HUBZone “sources sought” notice for aircraft washing at Fairchild AFB, Washington. The Air Force received capability statements from at least seven firms, but decided to issue a delivery order instead of conducting a HUBZone set-aside. AR, Tab 21. The contracting officer did not obtain the names or capability information of any of the HUBZone firms in either procurement.

DISCUSSION

SWR asserts that the agency unreasonably determined not to set the procurement aside for HUBZone small business concerns. Specifically, SWR asserts that the agency failed to conduct sufficient market research prior to issuing the RFP, as evidenced by the agency’s subsequent awareness of the CAFB HUBZone set-aside and the existence of more than two HUBZone certified firms—including SWR—that were interested in competing for this requirement. The agency asserts that its market research prior to issuing the RFP was reasonable and that its additional,

post-protest research validated its conclusion that a HUBZone set-aside was not appropriate.³

Acquisitions must be set aside for HUBZone small business concerns if the agency determines that there is a reasonable expectation that offers will be received from two or more HUBZone small business concerns, and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.1305(a), (b). An agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns with the capability to perform the work, and we will review a protest to determine whether the agency has done so. Global Solutions Network, Inc., B-292568, Oct. 3, 2003, 2003 CPD ¶ 174 at 3. While the use of any particular method of assessing the availability of HUBZone small businesses is not required, and measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

While, as noted above, the agency here undertook efforts to determine whether two capable HUBZone firms would submit offers, we find that its efforts were insufficient under the circumstances.

The agency relies on the contracting officer's Pro-Net research—which did not identify any HUBZone concerns—and the lack of expressed interest from firms that identified themselves as HUBZone concerns in support of its position that its review was adequate. However, even though its original Pro-Net research did not identify any HUBZone concerns, as of April 1, more than 1 month before the RFP was issued, the agency knew that CAFB had conducted a HUBZone set-aside for aircraft washing services, and that SWR and USL had competed for that award. At that same time, the agency received, and responded to, an e-mail from USL expressing a specific interest in participating in this procurement, and the agency knew of SWR's 10-year performance of aircraft washing services at Cherry Point.

Although the information regarding the CAFB HUBZone procurement and SWR and USL cast serious doubt on the validity of her research and resulting decision, the contracting officer continued to rely on that research and the lack of expressed interest in affirming the decision. This was unreasonable. Since the contracting officer should have known that the research on which her decision had been based—

³ We also requested that SBA respond to the issues raised in SWR's protest. SBA agrees with the protester that the agency's market research was flawed and that its decision not to issue a HUBZone set-aside was not reasonable. SBA Comments (Aug. 10, 2004) at 9.

showing no HUBZone concerns--was flawed, at a minimum she should have conducted additional research.⁴ In particular, since the contracting officer now was aware that SWR and USL were HUBZone concerns, she should have contacted the firms to ascertain their interest and capability. In the event that additional information about SWR and USL did not result in a decision to set the requirement aside, additional research--similar to the research later conducted following SWR's agency-level protest--would have been warranted to determine whether other HUBZone firms competed for the CAFB set-aside and, if so, whether they were capable and available to perform the current requirement. Such additional research would have shown that four of the six other firms that competed were HUBZone certified concerns.⁵

The agency relies on the findings from its post-protest market research and reassessment of the set-aside decision to show, essentially, that its decision would have been the same even if it had conducted further research before issuing the RFP. Specifically, the agency performed additional market research on Pro-Net, reviewed the CAFB procurement and its HUBZone contractors, and considered the interest and capability of USL, SWR, and a third firm.⁶ With regard to USL--which had sent the agency an unequivocal written expression of interest following publication of the

⁴ SBA agrees that the contracting officer should have further reviewed the CAFB HUBZone procurement and reassessed her procurement strategy. SBA Comments (Aug. 10, 2004) at 7. We accord substantial weight to the SBA's view after its review of an agency's handling of set-aside determinations. See Global Solutions Network, Inc., *supra*, at 4.

⁵ The agency asserts that, approximately 1 year ago, SWR stated its intention not to contract with Cherry Point again, and that this provided a reasonable basis for concluding that SWR would not compete under a HUBZone set-aside. However, SWR disputes the agency's understanding, stating that it repeatedly expressed an interest in this follow-on procurement, Comments at 7, and the agency concedes that SWR expressed interest in competing for future government contracts, in general, during discussions about its past performance. Supplemental AR at 12. Given these facts, we find that the contracting officer should have verified SWR's intent.

⁶ This third firm, [deleted], had expressed interest prior to the issuance of the RFP, but did not identify its HUBZone status at that time. It attended the site visits, and the agency subsequently learned of its HUBZone status. The agency's review revealed that, while [deleted] had performed washing services at Cherry Point 10 years earlier, its SBA profile indicated that it only had 10 employees and did primarily construction work (its profile listed only construction NAICS codes), and [deleted] had only submitted past performance information on construction contracts. COS ¶ 17(a). Based on these considerations, it appears the agency reasonably concluded that [deleted] was not capable.

original small business set-aside notice--the agency sought to "verify" that USL was interested in competing by twice telephoning the firm's president after SWR's protest was filed. When that individual was unavailable, the contracting officer left messages to call back. COS ¶ 17(c). The calls were never returned, and the agency concluded from this, and from USL's failure to otherwise express interest in the procurement (such as by attending the site visits), that there was no reasonable expectation that USL would submit an offer. *Id.* As for SWR, the contracting officer explains that she had serious doubts that the firm was capable of handling the larger requirement, based primarily on the firm's experience and past performance at Cherry Point. Specifically, she notes that the current contract under which SWR experienced performance problems represents only 5 percent of the new requirement and is restricted to one wash station, while the RFP requirement encompasses staffing and managing performance at multiple wash stations at three geographically separate locations handling more and different types of aircraft. COS ¶ 17(b). Because it concluded from this additional research that there still were no capable and/or interested HUBZone concerns, the agency asserts that there is no basis to change its original determination that a HUBZone set-aside was not appropriate.

We find that the agency's post-protest conclusions--that SWR was not capable of performing and that USL was not interested in competing--were unreasonable. First, ignoring the fact that the agency's further review took place only after SWR's protest was filed, and that it affirmed its conclusion in the heat of litigation,⁷ we do not think that two telephone calls constituted a reasonable effort to ascertain USL's interest under the circumstances. Had the attempts to contact USL come in April, prior to issuance of the RFP, and shortly after USL expressed interest, the agency might have been justified in reaching this conclusion, but it is just as possible that USL would have expressed interest if the agency had attempted contact at that time. As it is, since the inquiries were made only after the RFP was issued as a non-HUBZone set-aside, there is no way of knowing whether USL's assumed lack of interest was due to changed business circumstances (since the time of its expression of interest), the failure to make this a HUBZone set-aside (in which case, USL might not have been interested in competing), or some other reason. We note in this regard that the agency does not indicate exactly what information was included in the messages left for USL. The content of the messages--for example, whether the agency specifically stated that it was soliciting USL's interest in performing this requirement under a HUBZone set-aside, or merely asked the company to return the calls, with no

⁷ While, in reviewing protests, we consider the entire record, including parties' later-developed explanations and arguments, we accord less weight to arguments and documentation--such as the agency's post-protest conclusions based on its further review--prepared in response to protest contentions. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

HUBZone set-aside reference—obviously could have affected whether USL would respond, as well as one’s interpretation of its failure to respond.

Regarding SWR, while the scope and complexity of a requirement is an appropriate consideration in determining a potential HUBZone offeror’s capability, Global Solutions Network, Inc., supra, at 2, here, the agency’s determination that SWR lacked the capability to perform was unreasonable. In this regard, the mere fact that SWR currently is performing only a small portion of the requirement does not necessarily equate with an inability to perform the larger requirement. There is no evidence that the agency actually considered whether SWR had the resources to perform the larger requirement. This is relevant given that SWR has 10 years of experience performing the type of work under the RFP, and that during part of its Cherry Point contract SWR performed washing services at a USMC base in Hawaii, for which it received exceptional past performance ratings. In addition, despite the fact that large businesses performed 95 percent of the requirement in the past, in setting the requirement aside for small businesses, the agency determined that small businesses generally could handle the substantially larger scope of work; it is not apparent why the agency considered SWR to be differently situated in this regard than other small businesses.

Turning to SWR’s allegedly marginal performance record at Cherry Point, the contracting officer noted a number of instances regarding labor issues and performance problems, and the contracting officer’s representative’s view that he would not award the firm another contract. COS ¶ 17(b). SWR asserts that the agency has mischaracterized its performance and provides explanations for the alleged performance issues. SWR Comments at 7. Regardless of whether SWR or the agency is correct, we believe that it was unreasonable for the contracting officer to conclude in advance, without at least more meaningfully reviewing SWR’s performance record, that perceived performance problems at Cherry Point would preclude SWR from receiving award. In this regard, as noted above, SWR’s performance was rated exceptional under at least one other contract—at the USMC base in Hawaii. See Rochester Optical Mfg. Co., supra, at 6 (offeror’s receipt of cure notice, without termination of contract, did not establish offeror was nonresponsible, and thus was not a reasonable basis for making a negative set-aside determination). We conclude that the agency unreasonably determined that SWR was not a viable potential HUBZone offeror.

RECOMMENDATION

We sustain the protest because the agency unreasonably determined that there was not a reasonable likelihood of receiving fair market offers from at least two HUBZone concerns; the agency was aware of at least two HUBZone concerns and failed to adequately assess their capability and interest before deciding against a HUBZone set-aside. We recommend that the contracting officer reasonably consider whether fair market price offers will be obtained from at least two capable HUBZone

small business concerns. This should include, at a minimum, a more thorough review of the capability and interest of the HUBZone concerns of which the agency already is aware, the HUBZone concerns that responded to the DHS and Fairchild AFB procurements, and the other HUBZone offerors involved in the CAFB set-aside. If, after conducting a proper market survey, the agency determines that there is a reasonable expectation of receiving offers from at least two capable HUBZone concerns at fair market prices, the contracting officer should cancel the RFP and re-issue it as a HUBZone set-aside. We also recommend that SWR be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2004). SWR's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel